IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO.2369 OF 2005

Mr.Suresh Gole with Mr.D.S.Belwalkar for the Petitioner.

Mr.Arun Singh for Respondents Nos. 2 & 3.

Office Notes, Office Memoranda of Coram, appearances, Court's order or directions	Court's or Judge's orders
	CORAM: D.K.DESHMUKH, J. **DATED:** 21st September,2005

P.C.:

1. Pursuant to the order of the court dated 3rd May, 2005, I have heard the petition finally.

2. A decree of eviction is secured by the present Petitioner against the original Defendant. Execution of that decree was obstructed by the Respondents Nos. 1, 2 & 3. Therefore, obstructionist notice has been taken out by the decree holder. The executing court framed the issues. Issue No.2 reads as under:-

"Does the Plaintiff prove that his decree for possession is legal and valid so also executable against the present obstructionists?"

3. An objection was raised to this issue by the decree holder pointing out that the court of competent jurisdiction has passed a decree in favour of the Plaintiff and as the execution of that decree is obstructed by the obstructionists, the burden to prove that the decree is not valid and is not binding on the obstructionists would be on the obstructionists and not on the Plaintiff and therefore, Issue No.2 should be deleted.

4. The executing court has rejected that application by order dated 12-4-2004.

5. Perusal of the order shows that the executing court did not understand the purport of the objection raised by the Plaintiff. The objection of the Plaintiff was

that by issue No.2 burden of proof is wrongly cast on the Plaintiff, the burden of proof should be cast on the obstructionists. The executing court declined to delete the issue No.2 by observing that because of Section 47 of C.P.C. all issues pertaining to the decree are to be decided in the execution proceedings. It is true that all questions as to validity of the decree are to be decided in the execution proceedings, but the question was on whom the burden to prove will lie? The burden to prove should have been cast on the obstructionists and not on the Plaintiff. The order impugned is therefore liable to be set aside. It is accordingly set aside. The application filed by the Plaintiff/decree holder, which is registered as Misc. Notice No. 549 of 2003, is granted in terms of prayer clause (a). The obstructionists are directed to pay as and by way of costs of this Petition Rs.15000/- to the Petitioner.

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